88-44

NO._______________

Supreme Court, U.S.
FILED
JUN 14 1988
JOSEPH F. SPANIOL, JR.
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1988

* *

CHILD, INC., Petitioner

v.

TEXAS EMPLOYMENT COMMISSION

* *

* *

PETITION FOR A WRIT OF CERTIORARI TO THE COURT APPEALS OF TEXAS, THIRD SUPREME JUDICIAL DISTRICT

* *

Respectfully submitted,

Eric R. Borsheim
Attorney of Record
910 West Avenue
Austin, Texas 78701
(512) 478-9089

Mark Z. Levbarg
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Austin, Texas 78701
(512) 477-4983

QUESTION PRESENTED FOR REVIEW

Whether, with regard to projects funded under the Head Start Act, petitioner is entitled to classification as an educational institution within the meaning of section 3304(a)(6)(A) of the Federal Unemployment Tax Act as a matter of law.

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NO. ______________________

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1988

* *

CHILD, INC., Petitioner

v.

TEXAS EMPLOYMENT COMMISSION

* *

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF TEXAS, THIRD SUPREME JUDICIAL DISTRICT

The Petitioner, Child, Inc. respectfully prays that a Writ of Certiorari issue to review the Judgment and Opinion of the Court of Appeals of Texas, Third Supreme Judicial District.

OPINIONS BELOW

The Opinion of the Court of Appeals of Texas, Third Supreme Judicial District is set forth in Appendix A. The

denials by the Supreme Court of Texas of petitioner's application for writ of error (Appendix C) and subsequent motion for rehearing is set forth in Appendix D. The appellate opinion reversed the judgment of the trial court (Appendix B) and upheld the ruling of the Texas Employment Commission (Appendix E).

JURISDICTION

The Judgment of the Court of Appeals of Texas was rendered on September 23, 1987. On February 3, 1988, the Supreme Court of Texas denied petitioner's application for writ of error. On March 16, 1988, the Supreme Court of Texas overruled petitioner's motion for rehearing of its application for writ of error. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Article VI Section 2 of the United States Constitution provides in relevant part:

> This Constitution, and the laws of the United States which shall be made in pursuance

> thereof...shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

2. Section 3(f) of the Texas Unemployment Compensation Act, amended in 1977 and codified in TEX. LAB. CODE ANN. art. 5221b-1(f), provides as follows:

> (f) Equal Treatment: Benefits based on services for all employers in employment defined in subsection 19(f) shall be payable in the same amount, on the same terms, and subject to the same conditions; except that:
>
> > (1) With respect to services in an instructional, research, or principal administrative capacity for an educational institution, benefits shall not be payable based on those services for any week commencing during the period between two (2) successive academic years (or, when an agreement provides instead for a similar period between

two (2) regular but not successive terms, during that period) to any individual if the individual performs those services in the first of the academic years (or terms) and if there is a contract or reasonable assurance that the individual will perform services in that capacity for any educational institution in the second of the academic years, or terms; and

(2) With respect to services in any other capacity for an educational institution (other than an institution of higher education), benefits shall not be payable on the basis of those services to any individual for any week which commences during a period between two (2) successive academic years or terms if the individual performs those services in the first of the academic years or terms and there is a reasonable assurance that the individual will perform those services in the second of the academic years or terms....

3. Section 3304(a)(6)(A) of the Federal Unemployment Tax Act, Pub. L. No. 94-566, codified at 26 U.S.C. Sections 3301-3311, provides in relevant part:

> (a) The Secretary of Labor shall approve any State law...which he finds provides that—
>
> > (6)(A) compensation is payable on the same basis of service to which section 3309(a)(1) applies...except that—
> >
> > > (i) with respect to services in an instructional, research, or principal administrative capacity for an educational institution to which section 3309(a)(1) applies, compensation shall not be payable based on such services for any week commencing during the period between two successive academic years or terms...and if there is a contract or reasonable assurance that such individual will perform services in any such capacity for any educational institution in the second of such academic years or terms.

> (ii) with respect to services in any other capacity for an educational institution to which section 3309(a)(1) applies—
>
> > (I) compensation payable on the basis of such services shall be denied to any individual for any week which commences during a period between 2 successive academic years or terms if such individual performs such services in the first of such academic years or terms and there is a reasonable assurance that such individual will perform such services in the second of such academic years or terms....

4. Section 9831(a) of the Head Start Act, Pub. L. No. 97-35, codified under Head Start Programs at 42 U.S.C. Sections 9831-9852, provides:

> In recognition of the role which Project Head Start has played in the effective delivery of comprehensive health,

> educational, nutritional, social and other services to economically disadvantaged children and their families it is the purpose of this subchapter to extend the authority for the appropriation of funds for such program.

5. Section 9836 of the Head Start Act, Pub. L. No. 97-35, codified under Head Start Programs at 42 U.S.C. Sections 9831-9852, provides:

> The Secretary [of Health and Human Services] is authorized to designate as a Head Start agency any local public or private nonprofit agency which (1) has the power and authority to carry out the purposes of this subchapter and perform the functions set forth in section 9837 of this title within a community; and (2) is determined by the Secretary to be capable of planning, conducting, administering, and evaluating, either directly or by other arrangements, a Head Start program.

6. Section 9833 of the Head Start Act, Pub. L. No. 97-35, codified under Head Start Programs at 42 U.S.C. Sections

9831-9852, provides:

> The Secretary [of Health and Human Services] may, upon application by an agency which is eligible for designation as a Head Start agency pursuant to section 9836 of this title, provide financial assistance to such agency for the planning, conduct, administration, and evaluation of a Head Start program focused primarily upon children from low-income families who have not reached the age of compulsory school attendance which (1) will provide such comprehensive health, nutritional, educational, social, and other services as will aid the children to attain their full potential; and (2) will provide for direct participation of the parents of such children in the development, conduct, and overall program direction at the local level.

STATEMENT

1. In 1977, the Texas Unemployment Compensation Act (TEX. LAB. CODE ANN. art. 5221b-1 et seq.) was amended in order to bring it into conformity with federal law, specifically Pub. L. No. 94-566, codified as section

3304(a)(6)(A) of the Federal Unemployment Tax Act, 26 U.S.C. Sections 3301-3311. This federal act establishes joint federal-state responsibility for unemployment insurance. If a state's unemployment insurance program complies with certain minimum federal standards, employers are allowed a credit against their federal unemployment tax liability for contributions made to the state fund, and the state is eligible for federal grants toward administration of their programs. A school-related seasonal unemployment between terms denial provision (Section (f) of art. 5221b-1 of the Texas Act) is one of the minimum federal standards with which a state must comply.

2. Child, Inc. operates all of the Project Head Start early childhood development centers in Travis County, Texas. The statutory framework of Head Start programs is set out at 42 U.S.C. Sections 9831-9852. Project Head Start is funded for nine months each year by the federal government, coincident with the school year. In pursuit of federal unemployment tax compliance, the Texas Employment Commission (hereinafter TEC) determined that Head Start employees of Head Start programs operated

by public schools could not collect unemployment benefits for the summer months. TEC also determined that "Community Action Agencies" operating Head Start programs were not educational institutions and would have to be taxed to pay unemployment benefits for employees not working during the summer. In making its determinations, TEC relied on a memorandum (Appendix F) and an unemployment insurance program letter (Appendix G) issued by the United States Department of Labor (hereinafter DOL).

3. Child, Inc. is neither a public school nor a Community Action Agency. It is, however, a non-profit corporation organized exclusively for purely public charity and strictly educational purposes, specifically, to provide an education and development program for children of Travis County, Texas. Moreover, the determinations made by TEC rely on the DOL's misguided interpretation of Congressional intent in setting up Project Head Start. Therefore, Child, Inc. seeks a reversal of the TEC ruling and the Texas Court of Appeals judgment as well as a determination that, as a matter of law, petitioner qualifies as an educational

institution for the purposes of state compliance with Section 3304(a)(6)(A) of the Federal Unemployment Tax Act.

REASONS FOR GRANTING THE PETITION

This case presents an important question concerning the administering of funds provided by Congress to local Head Start programs. The Court of Appeals of Texas, Third Supreme Judicial District has upheld a determination by the Texas Employment Commission that a Head Start program operated by any entity, other than a local public school, will be required to provide for the compensation of its seasonally unemployed workers because it will not qualify as an educational institution for the purposes of state compliance with the Federal Unemployment Tax Act yet, at the same time, Congress has only funded the Head Start early development program for the benefit of America's disadvantaged youth during the term of the academic school year.

Because federal law has not set out the definition of "educational institution" and thus has left the status of Head Start grantees unclear, the states have been left to grapple with the issue of whether a Head Start program qualifies as

an educational institution. The highest court of Colorado is in accord with the TEC position that Project Head Start must be delivered by a public school to be considered an educational institution. See *Indus. Comm'n of State v. Bd. of County Comm'rs of Adams*, 690 P.2d 839 (Colo. 1984). On the other hand, the highest reviewing courts of Iowa and North Carolina recognized that, in the absence of Congressional guidelines, the courts must look to the structure of Head Start programs as set forth by the Congress. In *Simpson v. Iowa Dept. of Job Serv.*, 327 N.W.2d 775, 777 (Iowa Ct. App. 1979), the Iowa court stated the following:

> The record reflects that there are four components to the Head Start program at issue here: a health component; parental involvement component; social services component; and educational component. The educational component involves the teaching the language, speaking, and self expression. The Head Start participants are oriented toward preparation toward the public school system. Additionally, the parents of Head Start children are educated in nutrition and child care.

> Admittedly, there are elements of the Head Start Program which could not be considered academic, but which we believe are sufficient indicia of academic training to warrant a finding consistent with (the Iowa Employment Security Law).

The Iowa Court cited the North Carolina case of *In re Huntley,* 42 N.C. App. 1, 4, 255 S.E.2d 574 (1979) in support of its position and concluded by saying:

> We agree with the District Court's conclusion that Head Start is an educational institution within the meaning of Section 96.19(37) and that such petitioners are barred from unemployment compensation since they had reasonable assurance of re-employment in the next successive academic term in a similar capacity. *Simpson,* 327 N.W.2d at 779.

In 1984, a Washington court cited the Iowa case because it found that the *Simpson* court had applied the United States Department of Labor's Draft Language and Commentary in establishing a working definition of

"educational institution" as it pertains to unemployment compensation benefits. *Alexander v. Employment Sec. Dept. of State,* 38 Wash. App. 609, 620, 688 P.2d 516, 523 (1984). This court found that the DOL Commentary listed certain criteria and included that:

> [i]n any particular case, the question of whether or not an institution is an educational institution (other than an institution of higher education) within the meaning of the criteria described above will depend on what that particular institution actually does. Id. at 621, 688 P.2d at 524.

Thus, Child, Inc. would argue that conflict exists among the states as to what constitutes an educational institution as it pertains to unemployment compensation benefits and federal law as well as the fact that DOL itself has commented that classification depends on what the particular institution actually does.

In 42 U.S.C. Section 9831(a) the purpose and policy of Head Start programs is stated.

> In recognition of the role which

> Project Head Start has played in the effective delivery of comprehensive health, educational, nutritional, social and other services to economically disadvantaged children and their families it is the purpose of this subchapter to extend the authority for the appropriation of funds for such program.

The statutory language suggests that Congress has recognized the educational services that Project Head Start has delivered to disadvantaged children and their families as a matter of law.

In Section 9836, the Secretary of Health and Human Services is authorized to designate, as a Head Start Agency, any local, public or private non-profit agency which has the power and authority to carry out the purposes of the subchapter and is determined to be capable of planning, conducting, administering, and evaluating a Head Start Program. In Section 9833, the Secretary of Health and Human Services is authorized to grant to a designated agency funds to promote

> ...a Head Start program focused primarily upon children from low income families who have

> not reached the age of compulsory school attendance which (1) will provide such comprehensive, health, nutritional, educational, social and other services as will aid the children to attain their full potential; and (2) will provide for direct participation of the parents of such children in the development, conduct, and overall program direction on the local level (emphasis provided).

As a matter of law, the United States Congress has funded Head Start to provide educational services for preschool children who have not reached the age of compulsory school attendance. The Texas Court of Appeals Opinion has made a mockery of the federal statute and the Supremacy Clause of the United States Constitution (Article VI, Section 2) when it relies on the age of the children as evidence that they are not capable of being educated; or as evidence that no institution serving their needs is "educational." To reject the Colorado approach as well as that of Texas is the means to effectuate the intent of Congress and the Head Start Act because to do otherwise would require that, since there is a mandatory unfunded period of the Head Start Program,

fewer children would be served during the regular academic year in order to pay for unemployment benefits during the summer academic recess to workers given a reasonable assurance of re-employment in the next successive academic term in a similar capacity. This Court can, however, maintain the integrity of federal law and the Head Start Act by a finding that, as a matter of law, Child, Inc. is an educational institution for the purposes of state compliance with Section 3304(a)(6)(A) of the Federal Unemployment Tax Act. Such a holding would be in line with the opinion of the United States Assistant Secretary for Human Development Services who has requested in his "Justifications of Appropriations Estimates" for fiscal year 1989 that language be added to federal law clarifying the status of Head Start grantees. (See Appendix H.) This request asks that, with regard to projects funded under the Head Start Act, grantees be considered as educational institutions within the meaning of Section 3304(a)(6)(A) of the Federal Unemployment Tax Act.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Eric R. Borsheim
Attorney of Record
910 West Avenue
Austin, Texas 78701
(512) 478-9089

Mark Levbarg
910 West Avenue
Austin, Texas 78701
(512) 477-4983

CERTIFICATE OF SERVICE

I, Eric Borsheim, a member of the Bar of the Supreme Court of the United States and counsel of record for Child, Inc., petitioner herein, hereby certify that, pursuant to Rule 33, Rules of the Supreme Court, I served three (3) copies of the foregoing Petition for Writ of Certiorari to the Court of Appeals, Third Supreme Judicial District to Ms. Susan F. Eley, by P.O. Box 12548, Austin, Texas 78711-2548, certified mail, postage prepaid on the 7th day of July, 1988.

All parties required to by served have been served.

Dated July 7th, 1988.

/s/

Eric R. Borsheim
910 West Avenue
Austin, Texas 78701
(512) 478-9089

APPENDIX "A"

IN THE COURT OF APPEALS,
THIRD SUPREME JUDICIAL DISTRICT
OF TEXAS, AT AUSTIN

NO. 3-86-115-CV

TEXAS EMPLOYMENT COMMISSION,
APPELLANT
vs.
CHILD, INC.,
APPELLEE

FROM THE DISTRICT COURT OF TRAVIS
COUNTY, 147TH JUDICIAL DISTRICT
NO. 393,174,
HONORABLE HERMAN FITTS, JUDGE

This is an appeal from a district court judgment reversing a decision of the Texas Employment Commission. The Commission had ruled that employees of

appellee, a corporation operating a "Head Start" program for preschool children, qualified for unemployment benefits. The trial court granted a "declaratory judgment" that appellee was an "educational institution;" thus, the employees were not entitled to benefits under a section of the Texas Unemployment Compensation Act which denies benefits to educational employees idled during summer school vacation. We will reverse the judgment of the trial court and render judgment that the claimants recover their unemployment compensation benefits.

Section (f) of the Texas Unemployment Compensation Act, Tex. Rev. Civ. Stat. Ann. art. 5221b-1 (1987), provides that employees of

"educational institutions" do not qualify for unemployment benefits between academic terms if there is a contract or reasonable assurance that the individual will perform services in the same capacity during the next academic term or year. This provision was intended to prevent employees of educational institutions from collecting unemployment benefits during regular periods of summer vacation. The restriction of benefits to these workers was enacted to bring the Texas Unemployment Compensation Act into conformity with federal law. <u>See</u> Tex. S. B. 896, 65th Reg. Sess. (1977) and 26 U.S.C.A. Section 3304 (A)(6)(A). It is appellee's status as an "educational institution" under Section (f) of the

Texas act that is the subject of this controversy.

Appellee, Child, Inc., operates a federally funded Head Start program for preschool children. It is a non-profit corporation employing some two hundred persons. The corporation does not, however, provide jobs for any of its employees during three months of each year falling between the nine-month academic terms. During these periods of unemployment, appellant, the Texas Employment Commission, awarded unemployment insurance benefits to Child, Inc.'s employees. Because unemployment awards are used by the Commission in computing appellee's tax rate, appellee protested the employees' claims.

Upon review of appellee's protests, the Commission ruled that appellee was not an "educational institution" and that its employees were entitled to the benefits. Appellee appealed the decision to the appellate division of the Commission and then to district court. The district court reversed the ruling of the Commission and declared that "Child, Inc. is an educational institution for the purposes of the Texas Unemployment Compensation Act." The court further ordered that the claimants were not entitled to recover unemployment benefits for the summer vacation period. The Commission appealed to this Court.

The Commission brings three points of error. First, the Commission

asserts that the trial court lacked jurisdiction to hear the appeal; second, that the trial court erred as a matter of law in reversing the Commission since its decision was based on long standing administrative policy; and third, that the administrative decision was based on substantial evidence.

Appellant first contends that the trial court lacked jurisdiction on grounds of sovereign immunity. Because a suit against the Commission is a suit against the State, Olson v. Texas Employment Commission, 593 S.W.2d 866, 867 (Tex. Civ. App. 1980, writ ref'd n.r.e.), one may sue the Commission, as a general rule, only if there is an express grant of authority permitting

that suit. Texas Employment Commission v. International Union of Electrical Workers, 352 S.W.2d 252, 254 (Tex. 1961). Appellant argues the exclusive grant of authority permitting suit against the Commission allows only suits to collect unemployment benefits because it does not mention declaratory judgments. See Tex. Rev. Civ. Stat. Ann. art. 5221b-4(i) (1987). The Texas Unemployment Compensation Act provides that "[w]ithin ten (10) days after the decision of the commission has become final, and not before, any party aggrieved by a decision of the Texas Employment Commission may secure judicial review of that decision in any court of competent jurisdiction...." See Tex. Rev. Civ. Stat. Ann. art.

5221b-4(i) (1987). This statutory cause of action is <u>not</u> limited to the suits suggested by appellant. The jurisdictional question turns on whether Child, Inc. properly invoked its right of judicial review under art. 5221b-4(i).

It is well settled that where there are no special exceptions, as here, a petition will be construed liberally in favor of the plaintiff. Roark v. Allen, 633 S.W.2d 804 (Tex. 1982). In paragraph 5 of its first amended petition to the district court, Child, Inc. requested:

> "a trial, and after trial, declaratory judgment that it operates an education institution exempt from claims made during customary vacation times therefore defeating the claims of the individual parties named

> in Exhibit Two, who have been granted relief by T.E.C.; <u>a reversal of TEC's decision</u>, Exhibit One,
>
> and
>
> as all other relief at law or in equity to which it may prove itself. entitled."

(emphasis supplied). The Commission decision is mentioned by name and incorporated by reference in appellee's first amended petition. Appellee also attached the Commission decision as an exhibit. Appellee stated it was an aggrieved party (paragraph 1, amended petition) pursuant to the language of art. 5221b-4(i) and, in paragraph 4, stated a ground for review. Finally, Child, Inc. specifically requested <u>reversal</u> of the Commission decision as well as declaratory relief. We hold

appellee properly invoked the statutory right of review given an aggrieved party in art. 5221b-4(i).

Appellee coupled his request for judicial review with a request for declaratory judgment. A better drafting of the pleadings would have been to make the prayer for declaratory relief subject to the prayer for reversal. While the order of requested relief does not defeat Child, Inc.'s right to its remedy, neither does it entitle Child, Inc. to redundant remedies. Judicial review of the Texas Employment Commission's decision will resolve the same controversey sought to be resolved by declaratory judgment. Where a statute provides a method for attack on a Commission order, an action

for declaratory judgment does not lie. Railroad Commission of Texas v. Home Transportation Company, 670 S.W.2d 319, 326 (Tex. Civ. App. 1984, no writ). Thus, we hold the trial court had jurisdiction to review the Commission's ruling based upon the statutory provision for judicial review contained in art. 5221b-4(i).

We do not, however, believe that the trial court was correct in reversing the Commission's order. The legal standard to be applied by a court in reviewing a decision by an administrative agency is whether there was substantial evidence to support its findings. Mercer v. Ross, 701 S.W.2d 830, 831 (Tex. 1986); Maintenance Management, Inc. v. Texas Employment

Commission, 557 S.W.2d 561, 563 (Tex. Civ. App. 1977, writ ref'd n.r.e.). A concise statement of the substantial evidence rule is made in De Leon v. Texas Employment Commission, 529 S.W.2d 268 (Tex. Civ. App. 1975, no writ), which states as follows:

> Under that rule [substantial evidence rule], the issue to be decided in the courts and on which evidence is heard is the reasonableness of the Commission's decision; this is a question of law and an appellate court cannot render its decision based upon facts found by the trial court because the legal test of the reasonableness of the decision of the commission is whether it is supported by substantial evidence, and nothing else; it is the Commission's fact finding that is before the trial and appellate courts; a court cannot substitute its judgment for that of the Commission.

Id. at 270 (emphasis added), citing City of San Antonio v. Texas Water Commission, 407 S.W.2d 752, 756 (Tex. 1966).

The findings of fact by the Commission indicate that appellee operates thirteen preschools under the federally funded Head Start program. The Head Start program provides funds for schools, community action agencies and other entities to deliver preschool training and other benefits to children of low income families throughout the country. Appellee is not licensed by the State or any agency thereof. Its employees, including the claimants here, are not licensed school teachers. All the children served by Child, Inc. are of preschool age.

Finally, the purpose of the program is to provide low income children with the basic learning skills and socialization necessary to function as well in the regular school system as children of higher income families.

The Commission's conclusions, drawn from its findings, state that, while the basic thrust of appellee's activities is educational, most if not all of these services would be available in a regular day care center. In its analysis, the Commission emphasized that none of the individuals working with the children held teaching certificates. Furthermore, none of the children served by appellee were required by law to attend school nor were these

children even eligible to attend public schools other than kindergarten. The Commission also ruled that the educational aspect of the program was merely incidental to the primary purpose of bringing the participating children to a level of social development where they can better cope with the environment of a primary school. As a result, the Commission concluded that appellee was not an "educational institution." Based on the record in this case, we cannot say this conclusion was not based on substantial evidence or was unreasonable.

Because we hold that the Commission's ruling was based on substantial evidence, we find it

unnecessary to proceed to appellant's other point of error.

The judgment of the trial court is reversed, and judgment is here rendered affirming the order of the Commission.

Jim Brady, Justice

[Before Chief Justice Shannon, Justices Brady and Aboussie]

Reversed and Rendered

Filed: September 23, 1987

[Publish]

APPENDIX "B"

NO. 393,174

CHILD, INC.* IN THE DISTRICT COURT
V. *
TEXAS *
EMPLOYMENT * OF TRAVIS COUNTY, TEXAS
COMMISSION,*
ETAL * 147TH JUDICIAL DISTRICT

JUDGMENT

On July 25, 1986, the above styled and numbered cause came on to be heard. All parties were present and represented by counsel. Trial was to the Court. Testimony was taken. From the evidence presented, the Court finds that Child, Inc. is an "educational institution" as that phrase is understood in the Texas Unemployment

Compensation Act and that its employees who are idled each summer between academic terms and who are reasonably assured of employment in the following fall academic term are not eligible for unemployment benefits for the summer period. Further, the fifteen claimants here (set forth in Exhibit One to this Judgment) are found to be employees who were not eligible for unemployment benefits for the Summer of 1985, as they were reasonably reassured of reemployment (and were reemployed) in the Fall of 1985.

IT IS THEREFORE:

DECLARED that Child, Inc. is an educational institution for the purposes of the Texas Unemployment Compensation Act; and it is

ORDERED, ADJUDGED and DECREED that the Texas Employment Commission Opinion of February 18, 1986 is REVERSED; that the claimants whose names appear in Exhibit One to this Judgment were not entitled to recover unemployment benefits for the Summer of 1985; and all costs having been paid, no Order for costs shall issued. All other relief requested by any party is hereby DENIED.

Signed this 1st day of September, 1986.

HERMAN FITTS
Judge Presiding

EXHIBIT ONE

SS No.	Claimant Name	IC Date
456 60 7263	Mary L. Austin	06-10-85
466 74 3163	Shirley J. Brown	06-04-85
467 13 2598	Terri J. Carter	06-04-85
463 92 2689	Henrietta Castillo	06-03-85
453 84 4165	Gwendolyn Colvin	06-13-85
452 11 2735	Margaret P. Flores	06-15-84
450 46 9607	Dorothy Elliott	06-14-85
451 74 6105	Barbara C. Field	06-17-85
450 38 6846	Mattie C. Garrett	06-13-85
454 42 0328	Mary E. Jackson	06-10-85
459 78 0954	Rosie L. Johnson	06-10-85
453 64 0982	Lois L. Miles	06-21-85
457 70 1252	Wanda L. Milligan	06-11-85
450 92 8889	Edwina W. Moten	06-10-85
458 44 6035	Lucile Vaughen	06-10-85
451 74 6534	Imogene Young	06-10-85

APPENDIX "C"

SUPREME COURT OF TEXAS
Supreme Court Building
Austin, Texas 78711
Mary M. Wakefield, Clerk

February 3, 1988

Mr. Mark Z. Levbarg
910 West Avenue
Austin, TX 78701

Ms. Susan F. Eley
Office of the Attorney General
P. O. Box 12548
Austin, TX 78711

RE: Case No. C-7029

STYLE: CHILD, INC. V.
TEXAS EMPLOYMENT COMMISSION

Dear Counsel:

Today, the Supreme Court of Texas

denied the above referenced application for writ of error, as supplemented, with the notation, Writ Denied. Petitioner's motion to supplement application for writ of errir is granted. (Justice Culver not sitting.)

Respectfully yours,

Mary M. Wakefield, Clerk

APPENDIX "D"

SUPREME COURT OF TEXAS
Supreme Court Building
Austin, Texas 78711
Mary M. Wakefield, Clerk
February 3, 1988

Mr. Mark Z. Levbarg
910 West Avenue
Austin, TX 78701

Ms. Susan F. Eley
Office of the Attorney General
P. O. Box 12548
Austin, TX 78711

RE: Case No. C-7029

STYLE: CHILD, INC. V.
TEXAS EMPLOYMENT COMMISSION

Dear Counsel:

Today, the Supreme Court of Texas

overruled petitioner's motion for rehearing of the application for writ of error in the above styled case.

Respectfully yours,

Mary M. Wakefield, Clerk

APPENDIX "E"

TEXAS EMPLOYMENT COMMISSION: Appeal Tribunal Decision

Appeal No.: 85 59427 1 108

<u>CASE HISTORY</u>: By determinations made during the months of June and July, 1985, it was ruled that the employer had filed timely protests, or responses, to the claimants' initial claims under Section 6(b) of the Texas Unemployment Compensation Act, and that no issues concerning entitlement to benefits were raised. The employer appealed.

It was also ruled that any benefits paid to these claimants based on wage credits from this employer would be charged back to the employer's tax

account for use in computing the employer's tax rate.

<u>FINDINGS OF FACT</u>: The determination made on Barbara C. Fields, Social Security No. 451 74 6105, was mailed out to both parties on June 26, 1985. The employer's letter of appeal for this particular claimant was prepared on July 7, 1985. The employer representative who prepared the letter of appeal then went on vacation, and does not know when the letter was actually mailed. The postmark date on the letter of appeal is July 9, 1985.

The claimants in question have all worked for Child, Inc. for at least 10 years. They are teacher's aides, teachers, teacher directors, and center

directors, for Child, Inc. In all cases, the claimants have had reasonable assurance of reemployment during the next academic year, have always come back during the fall of each academic year, and, in all cases, are currently employed by Child, Inc. during the academic year 1985-1986.

Child, Inc. is a title 20 provider, and the only headstart provider in the Austin, Travis County area. They have a tax exemption from the Comptroller as a nonprofit educational organization. In addition, they have an exemption from federal income tax dating back to 1973. The articles of incorporation of Child, Inc., filed with the Secretary of State in 1972, state that the corporation is a nonprofit corporation,

organized exclusively for purely public charity and strictly educational purposes, specifically, to provide an education and development program for children of Travis County, Texas.

Child, Inc. offers preschool training to lower income children, their eligibility set by Federal standards, and operate about 20 centers. There is a set curriculum, set by Federal guidelines, and testing available for the children. This program serves about 1250 children in the Travis County area, all of preschool age.

The purpose of the program is to give low income children some socialization skills, and basic learning skills, to enable them to

function as well in the regular school system as children of higher income families. This is done by encouraging motor skills, basic socialization skills, pre-reading skills, pre-arithmetic skills, and basic interaction skills among children. The curriculum is not a rigid requirement of what to "teach", but a guideline to follow in dealing with the children. The individuals doing the "teaching", and the "teacher aides", do not have teacher certificates. The "teachers" do receive at least 12 hours of training each year, to enable them to better serve the children that they are working with.

CONCLUSIONS: Section 6(b) of the Texas Unemployment Compensation Act

provides, in part, that unless the claimant or the individual or organization to which the copy of the determination was mailed files an appeal from such determination within twelve calendar days after such copy of the determination was mailed to his or its last-known address as reflected by Commission records, such determination shall be final for all purposes and benefits shall be paid or denied in accordance therewith.

In the appeal involving Barbara C. Fields, according to the evidence, it must be concluded that the employer's appeal was filed on the thirteenth day after the determination was mailed out, since there is no evidence that the employer actually mailed the letter of

appeal any earlier than July 9, 1985. Therefore, it must be concluded that the employer failed, without good cause, to file a timely appeal from the determination in question. Therefore, that determination, for that particular claimant, holding that the claimant is not disqualified for unemployment benefits, and holding that the employer's account will be chargeable for the claimant's unemployment benefits, is left in full force and effect.

See Section 3(f) of the Act on the attached form. The thrust of the employer's appeal is that the employer, Child, Inc., is an educational institution, and therefore that the wage credits from Child, Inc. should be

removed from the benefit claim determinations on all of these claimants, leaving all of them monitarily ineligible for unemployment benefits. Since the Act itself offers no specific definition of what an educational institution is, the Appeal Tribunal holds that an educational institution should be defined in the manner in which the term is commonly understood. That analysis leads us to conclude that Child, Inc. is not an educational institution within the meaning of the Act. The children are all preschool aged children, and the individuals working with them do not have teacher certificates. None of the children benefiting from the services provided by this institution are

required by state law to attend school, nor could any of them actually attend the public schools, except for kindergarten. In addition, most, if not all, of the services offered by Child, Inc., would be available in a regular day care center. While the Appeal Tribunal notes that the basic thrust of the program is an educational one, in a sense, and that it is preparing children for grade school, that same statement could also be made of any day care center, or any employer in the business of taking care of children during the day. Therefore, for the above reasons, it held that Section 3(f) of the Act does not apply to Child, Inc., in that they are not an "educational institution" within the

meaning of the Texas Unemployment Compensation Act. Therefore, the claimants' eligibility for unemployment benefits is unaffected by Section 3(f) of the Act, and these claimants are all eligible for unemployment benefits for the period of time for which they were unemployed.

See Section 5(b) of the Act on the attached form. Since the employer does not really raise any issue as to the claimant's actual separation from employment, the determination holding these claimants to be not disqualified under Section 5(b) of the Act will be affirmed.

See Section 7(c)(2)(A) of the Act on the attached form. Since the claimants in question did not

voluntarily quit their jobs, and were not discharged for work connected misconduct, the determination holding the employer's account to be chargeable for the claimants' unemployment benefits will be affirmed.

<u>DECISION</u>: In the appeal involving Barbara C. Fields, the appeal dated July 9, 1985 is dismissed for want of jurisdiction, leaving in full force and effect the determination dated June 26, 1985.

The determinations dated June and July, 1985, allowing benefits without disqualification under Section 5(b) of the Act, is affirmed.

The chargeback determination is also affirmed. Any benefits paid to the claimants based on wage credits

from this employer will be charged back to the employer's tax account for use in computing the employer's tax rate.

The claimants in question are all eligible for unemployment benefits under Section 3(f) of the Act, as it is held that this employer was not an "eductional institution" within the meaning of the Texas Unemployment Compensation Act.

Dick Kingsley
Appeals Referee

MARY L. AUSTIN

SSN 456-60-7263

APPEAL NO. 85-12641-10-111585

DOCKET NO. 6

I DISSENT:

I dissent from the majority affirmation of the Appeal Tribunal decision in this case.

There are no precedent cases in Texas on this issue. There are, however, two applicable out-of-state cases, one from Colorado and one from Iowa. In <u>Board of County Commissioners vs. Martinez</u>, 43 (Colo.App.322,602P.2d911(1979), the court ruled that inasmuch as Head Start programs are operated similarly to public school programs, following the regular school calendar for classes and

vacation periods, and that inasmuch as it was teaching and improving its pupils, it was an educational institution and the employees were therefore ineligible under the equal treatment section of the unemployment compensation law. After that decision, the Colorado General Assembly amended their statute to except Head Start programs from the term "educational institution" unless it was part of a school administered by the Board of Education. As a result, under that modification, Head Start employee of a program operated by a school district would not be entitled to unemployment compensation benefits during the summer months, while those working for other employers would be eligible. In <u>Board</u>

<u>of County Commissioners of the County of Weld vs. Muniz, at all</u>, etal, the Colorado Court of Appeals in 1982 ruled that the exception was unconstitutional because it distinguished between Head Start workers employed by school districts and those employed by other agencies.

In <u>K.M. Simpson, et al vs. The Department of Job Service</u>, the Iowa Court of Appeals on October 28, 1982, ruled that although the Iowa Head Start Preschool had not been approved, licensed or issued a permit to operate as a school, it was issued a preschool license by the Department of Social Services, its program included teaching of language, speaking and self expression and, thus, was an

educational institution precluding its employees from receiving unemployment compensation benefits during the summer months.

Although the out-of-state cases are not binding on the Commission or Texas Courts, I feel that the better conclusion would be to consider Child, Inc., (and other entities in the same situation) an educational institution and deny benefits to the claimants for any week during a customary vacation period between terms.

Mary Scott Nabers
Commissioner
Representing Employers

Texas Employment Commission
TEC Building
Austin, Texas 78778

Attached is a copy of the decision of the Texas Employment Commission which affirms the decision of the Appeal Tribunal. This means that the Commission, after reviewing the case, is convinced that the decision of the Appeal Tribunal was correct and the Commission has adopted the decision of the Appeal Tribunal without repeating it in detail. Please review the Appeal Tribunal decision which was previously mailed to you and if you have any questions regarding it or the Commission decision, a representative in the local office of the Commission will be glad to explain the matter to you.

If the decision of the Appeal Tribunal imposed or continued an order of ineligibility, such ineligibility will remain in effect as a result of the attached Commission decision. However, ineligibility is not a permanent condition and if claimant believes that the conditions upon which the ineligibility was established have changed, he should contact the local office, advise them of the new conditions, and request that the ineligibility be removed. A ruling will then be made on the request.

Section 6(h) of the Texas Unemployment Compensation Act provides, in part, that this decision will become final ten (10) days after the date of mailing thereof, unless, within such

ten (10) days, the appeal is reopened by Commission order or a party to the appeal files a written motion for rehearing.

Such motion for rehearing may be filed by writing directly to this office at the address shown above, or such motion for rehearing may be filed in person at any local Commission office. The motion for rehearing should set forth clearly and specifically the reason for the request for rehearing, including a brief description of any evidence which was not available at prior hearings. Your request for a rehearing will be denied unless you can show substantial reason for the Commission to grant the rehearing. Please include the

claimant's social security number and the appeal number in your request.

Section 6(i) of the Act provides, in part, as follows: "Within ten (10) days after the decision of the Commission has become final, and not before, any party aggrieved thereby may secure judicial review thereof by commencing an action in any court of competent jurisdiction in the county of claimant's residence against the Commission for the review of its decision, in which action any other party to the proceeding before the Commission shall be made a defendant, provided that if a claimant is a nonresident of the State of Texas such action may be filed in a court of competent jurisdiction in Travis

County, Texas, or in the county in Texas in which the last employer has his principal place of business, or in the county of claimant's last residence in Texas. Such trial shall be de novo. In such action, a petition which need not be verified, but which shall state the grounds upon which a review is sought, shall be served upon a member of the Commission or upon such person as the Commission may designate and such service shall be deemed completed service on all parties, but there shall be left with the party so served as many copies of the petition as there are defendants and the Commission shall forthwith mail one such copy to each such defendant...."

A-8A (973)

APPENDIX "F"

U. S. DEPARTMENT OF LABOR
Employment and Training Administration
Washington, D. C. 20213

September 1, 1977

MEMORANDUM FOR: ALL STATE AGENCY ADMINISTRATORS AND ALL REGIONAL ADMINISTRATORS, EMPLOYMENT AND TRAINING ADMINISTRATION

FROM: LAWRENCE E. WEATHERFORD, JR., Administrator, Unemployment Insurance Service

SUBJECT: Supplement #4 -- Questions and Answers Supplementing _Draft Language and Commentary to Implement the Unemployment Compensation Amendments of 1976 - P.L. 94-566_

The enclosed questions and answers reflect issues that have arisen since Supplement #3 was issued.

The questions and answers are keyed to the applicable provision and its commentary in the 1976 Draft Legislation (and supplements, as appropriate) and are issued as the fourth supplement to it.

Please annotate your copies of the 1976 Draft Legislation to reflect these additions.

Additional explanations and interpretations will be issued as needed and appropriate.

Enclosures

Supplement #4, 1976 Draft Legislation

August 26, 1977

Definition - Educational institutions, section 2(u)

Refer: Commentary, Page 39

2. Question: Are Head Start programs "educational institutions" or "schools" within the meaning of the Federal law?

Answer: No. Title 45, part 1304 of the Code of Federal Regulations, promulgated by the Department of Health, Education and Welfare, sets out the program performance standards for the Head Start program. In these regulations, the program is defined as a comprehensive developmental program designed to meet children's needs in the health (medical, dental, mental

nutritional) social, and educational areas. The goal is child adjustment and development at the emotional and social level, rather than school-type training. There are educational objectives, but these are designed to

> "Provide children with a learning environment and the varied experiences which will help them develop socially, intellectually, physically, and emotionally in a manner appropriate to their age and stage of development toward the overall goal of social competence."

It appears to us that the educational aspect is incidental to the primary purpose of bringing the participating children to a level of development where they can better cope with the environment of a kindergarten or primary school. In addition, it is

our understanding that, in general, the Head Start staff members are not licensed as teachers and the Head Start programs are not licensed as schools in the States.

We provided a definition of "educational institution" on page 39 of Draft Language and Commentary to Implement the Unemployment Compensation Amendments of 1976 -- P.L. 94-566. We believe an organization is an educational institution within the meaning of the Federal law in question if: (a) participants, trainees, or students are offered an organized course of study or training, designed to transfer to them knowledge, skills, information, doctrines, attitudes or abilities from, by or under the

guidance of an instructor or teacher; (b) it is approved, licensed or issued a permit to operate as a school by the State Department of Education or other government agency that is authorized within the State to approve, license or issue a permit for the operation of a school; and (c) the courses of study or training which it offers may be academic, technical, trade or preparation for gainful employment in a recognized occupation.

For all of these reasons, Head Start programs do not, in our opinion, come within the definition of educational institution as used in the FUTA.

According to the Department of HEW, Head Start programs are operated by two

major groups: Community Action Programs and local Boards of Education. If the Head Start program is operated by a Community Action Program that is a nonprofit organization of the type described in section 501(c)(3) of the Internal Revenue Code of 1954, exempt from income tax under section 501(a) of that Code, as about 80 percent of the Head Start programs in the country are, then each Head Start program that employed four or more workers in 20 weeks should have been mandatorily covered under the State law as a subject nonprofit organization pursuant to the requirements of section 3309(a)(1)(A), FUTA, as added by P.L. 91-373, effective for services performed after

December 31, 1971. If the Head Start program is operated by Boards of Education or some other governmental entity, as about 20 percent of the programs in the country are, then the Head Start employees would be employees of the governmental entity and coverage determined accordingly.

Since Head Start programs are not educational institutions as defined, the employees are not subject to the "between-terms disqualification" applicable to school personnel by reason of sections 3304(a)(6)(A)(i), (ii) and (iii), FUTA. Benefits paid to individuals based on service with a Head Start program must be paid under the same terms and subject to the same conditions as benefits paid based on

any other service subject to the State unemployment compensation law, in order to meet the "equal treatment" requirements of section 3304(a)(6)(A), FUTA, applicable to benefits based on any service for a nonprofit organization or governmental entity.

Supplement #4, 1976 Draft Legislation
August 26, 1977
Between-terms denial, section 4(a)(3)
Refer: Commentary, page 52

1. Question: Are teachers employed by Educational Service Agencies (ESA's subject to the blanket between-terms denial provision of section 3304(a)(6)(A), FUTA?

Answer: No. The situation, as understood, is as follows: ESA's are governmental entities in about 28 States which employ a variety of teachers with special skills. These teachers are contracted out by the ESA's to individual schools to provide special education courses, such as remedial reading. The teachers remain employees of the ESA's, and are not

employees of the schools to which they are contracted.

Public Law 94-566, signed by the President on October 20, 1976 as amended by P.L. 95-19, signed on April 12, 1977, amended section 3304(a)(6)(A) of the Federal Unemployment Tax Act to include a blanket between-terms denial provision applicable to professional employees of educational institutions which overrides any of the State law eligibility and disqualification provisions applicable to other claimants.

This provision of Federal law requires States, beginning January 1, 1978, to deny benefits to individuals based on service in an instructional, research, or principal administration

capacity for an education institution if the individual performed the services in one year or term and has a contract of a reasonable assurance of performing those services in a succeeding year or term.

There is no definition of an "educational institution" in the Federal law other than that for an institution of higher education. However, it is clear from the Congressional debate and reports on P.L. 94-566 that Congress intended this term to mean schools, and not other governmental entities such as ESA's which employ teachers but are not themselves school. The definition of "educational institution" on page 39 of the 1976 Draft Legislation reflects

this Congressional intent. Accordingly, the between-terms denial provision does not apply to ESA employees.

APPENDIX "G"

U. S. Department of Labor
Employment and Training
Administration
Washington, D.C. 20213

August 3, 1979

DIRECTIVE: UNEMPLOYMENT INSURANCE PROGRAM LETTER NO. 40-79

TO: ALL STATE EMPLOYMENT SECURITY AGENCIES

FROM: DON A. BALCER
Acting Administrator
Field Operations

SUBJECT: Application of the Between-Terms Denial Provisions Required and/or Allowed by 3304(a)(6)(A), FUTA, to Headstart Program Personnel

1. Purpose. To transmit a modification of a previously published Federal position on personnel involved in the Headstart Program.

2. Reference. P.L. 94-566, P.L. 95-19, Draft Language and Commentary to Implement the Unemployment Compensation Amendments of 1976--P.L. 94-566 and Supplement 4, 1976 Draft Legislation, dated August 26, 1977.

3. Background. Under a previous published position, services performed in Headstart programs were not considered services for an educational institution in applying between-terms denial provisions in section 3304(a)(6)(A), FUTA, to employees participating in these programs. This has been modified to include certain

situations in which the between-terms denial may apply to Headstart employees.

<u>Supplement 4, 1976 Draft Legislation</u>, page 5, states that Headstart programs are not educational institutions within the meaning of section 3304(a)(6)(A), FUTA. This conclusion was reached by applying the definition of educational institution on page 39 of the <u>Draft Language and Commentary to Implement the Unemployment Compensation Amendments of 1976</u> to program standards for the Department of Health, Education and Welfare (HEW) Headstart program.

About 80% of Headstart programs are operated by Community Action Groups. Headstart programs operated by

Community Action Groups do not meet the criteria of educational institutions. This means that the services are covered, assuming the Community Action Group in a nonprofit organization as described in section 501(c) (3) of the Internal Revenue Code of 1954, is exempt from income tax under section 501(a) of that code, and employs four or more workers in 20 weeks, but that the work performed are not services for an educational institution and therefore, not subject to the between-terms denial provisions. That conclusion, as it applied to Community Action Groups operated Headstart programs, remains unchanged.

In other cases, HEW Headstart funds are paid to governmental entities.

Under this arrangement, a board of education may administer the program as a side activity, in a sponsorship role because no other agency is available locally to run the program. Such administration is separate from the board's educational role. In such a case, Headstart workers are not employees of an educational institution, since they are not employed by schools administered by the Board of Education; therefore, they are not subject to the Federal between-terms denial provisions.

Headstart programs in certain localities are not handled in this manner but are operated by individual boards of education as integral parts of schools, with programs conducted in

school buildings. In these instances, Headstart employees are under the supervision and control of the board, and are employees of the school; they are subject to the same employment conditions as other professional and nonprofessional school employees of the educational institution operated by the board. Under these circumstances, the Headstart employees are subject to the conditions of between-terms denial provisions applicable to other employees of educational institutions.

4. Interpretation. In light of the above, our original position has been modified to permit application of between-terms denial provisions when a local board of education operates a Headstart program as an integral part

of the school system i[illegible] facilities of an educational institution, with Headstart workers as employees of the board and the schools in every respect; i.e., subject to all employing policies, such as hiring, firing, working conditions, as other employees performing services for the educational institution. Under these circumstances, such workers are considered to be employed by an educational institution and as such, subject to the same between-terms denial provisions of the State law as are all other educational sintitution employees.

5. Action Required. SESAs are requested to:

a. Provide the above information to appropriate staff,

b. Instruct local office personnel to investigate conditions under which the Headstart program operates,

c. Determine if, in fact, employees of the program are performing their services for an educational institution and that they are employees of the school and the school board that operates that school.

6. Inquiries. Direct questions to your regional office.

3154 Services Performed in Headstart Programs. Headstart programs in certain localities are operated by individual boards of education as integral parts of schools with the programs being conducted in school buildings. In these instances, Headstart employees are under the supervision and control of the board, are employees of the schools, and are subject to the same employment conditions as other professional and nonprofessional school employees of the board. Under these circumstances, the Headstart employees are subject to the conditions of between-terms denial

provisions applicable to other employees of educational institutions under 3(f).

This denial also applies to employees of educational service agencies. An educational service agency is a governmental agency or other governmental entity that is established and operated exclusively to provide those services to one or more educational institutions. Headstart employees of an educational institution will have the denial applied to them, but Headstart employees of a program controlled by a community action agency will not have the denial applied.

It will be necessary for local office personnel to investigate the conditions under which each Headstart

program operates in order to determine whether Subsection 3(f) is involved.

APPENDIX "H"

Appropriation Estimate

Office of Human Development Services

Human Development Services

For carrying out, except as otherwise provided, the Runaway and Homeless Youth Act, the Older Americans Act of 1965, the Developmental Disabilities Assistance and Bill of Rights Act, the Child Abuse Prevention and Treatment Act, section 404 of Public Law 98-473, the Family Violence Prevention and Services Act (Title III of Public Law 98-457), the Native [Americans] **American** Programs Act, Title II of Public Law 95-266 (adoption opportunities), [Title II of the Children's Justice and Assistance Act of 1986,] chapter 8-D of Title VI of the Omnibus Budget Reconciliation Act

of 1981 (pertaining to grants to States for planning and development of dependent care programs), the Head Start Act, the Child Development Associate Scholarship Assistance Act of 1985, and part B of Title IV and section 1110 of the Social Security Act, [$2,455,532,000,] $2,456,868.000: Provided, That with regard to projects funded under the Head Start Act, grantees shall be considered as educational institutions within the meaning of section 3304(a)(6)(A) of the Federal Unemployment Tax Act. 1/

Further, for fiscal year 1990 for the foregoing programs and subject to the same terms and conditions, $2,505,023,000. 2/ (Department of Health and Human Services

Appropriations Act, 1988; additional authorizing legislation to be proposed for $26,089,000.)

Explanation of Language Changes

1/ Language is added to clarify the status of Head Start grantees.

2/ Pursuant to the Budget Summit, language is added to request a two-year appropriation.

Language Analysis

...Provided, That with regard to projects funded under the Head Start Act, grantees shall be considered as educational institutions within the meaning of section 3304(a)(6)(A) of the Federal Unemployment Tax Act.	Language is added to classify Head Start personnel as employees of educational institutions for purposes of unemployment compensation. Head Start personnel would be uniformly prohibited from collecting between term benefits.

Further, for fiscal year 1990 for the foregoing programs and subject to the same terms and conditions, $2,505,023,000.	Pursuant to the Budget Summit, language is added to request funds for fiscal year 1990 as part of the fiscal year 1989 budget request.

②

Supreme Court, U.S.
FILED
AUG 4 1988
JOSEPH F. SPANIOL, JR.
CLERK

NO. 88-44

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1988

CHILD, INC.

Petitioner

v.

TEXAS EMPLOYMENT COMMISSION

Respondent

RESPONDENT'S BRIEF IN OPPOSITION

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August 5, 1988
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35

QUESTION PRESENTED FOR REVIEW

Whether, with regard to projects funded under the Head Start Act, petitioner is entitled to classification as an educational institution within the meaning of 3304(a)(6)(A) of the Federal Unemployment Tax Act as a matter of law.

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Appendices

TABLE OF AUTHORITIES

Texas Unemployment Compensation Act,
TEX.LAB.CODE.ANN. art. 5221b-l et seq.
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art. 5221b-1 4

NO. 88-44

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1988

CHILD, INC.
Petitioner

v.

TEXAS EMPLOYMENT COMMISSION
Respondent

RESPONDENT'S BRIEF IN OPPOSITION

The Respondent, Texas Employment Commission, respectfully requests that this Court deny the Petition for Writ of Certiorari seeking a review of the judgment and opinion of the Court of Appeals, Third Supreme Judicial District of Texas, at Austin. That opinion is reported at *Texas Employment Commission vs. Child, Inc.*, 738 S.W.2d 56 (Tex.Civ.App. - Austin, 1987, writ ref'd.)

JURISDICTION

I. The Court should not take jurisdiction because Petitioner is seeking review of the judgment of a state court in which no federal question was raised. Although required by Supreme Court Rule 21(a), Petitioner's statement of the case does not specify the stage in the proceeding at which the federal question sought to be reviewed was raised, nor does it specify the method or manner of raising it and the way in which it was passed upon by the court. This glaring noncompliance with the rule is necessitated by the

simple fact that the Court of Appeals of Texas did not rule on a federal question because none was presented. Moreover, in later proceedings neither Petitioner's Motion for Rehearing (Appendix A) nor Application For Writ of Error (Appendix B) presented the state supreme court with a federal question.

It is axiomatic that the Court will not review a state court judgment based upon solely state grounds.

II. Alternatively, if the Court finds that a federal question has been properly presented it should still not take jurisdiction because the state court judgment is based upon a non-federal ground, and the non-federal ground is adequate to support the state court judgment. *Murdock vs. Memphis*, 20 Wall. 590,636; *Berra College vs. Kentucky*, 211 U.S. 45,53; *Fox Film Corp. vs. Muller*, 296 U.S. 207. The state court decision was based entirely on state law; specifically, the existence of substantial evidence to support the administrative decision of the Texas Employment Commission. The operation of the substantial evidence rule as it applies to decisions of the Texas Employment Commission is a well settled area of law in Texas, and therefore is clearly adequate to support the state court judgment. *Mercer vs. Ross*, 701 S.W.2d 830 (Tex. 1986).

REASONS FOR DENYING THE WRIT

THERE IS NO CONFLICT IN THE DECISIONS.

Petitioner alleges a conflict between state decisions of the various states and federal law regarding what constitutes an "educational institution." However, Petitioner admits in its brief that nowhere in applicable federal law, that is to say 26 U.S.C.§§3301-3311, nor in 42 U.S.C. §§ 9831-9852, is the term

"educational institution" defined. (Petition for Writ P.11) There is no federal law directing the various states to adhere to a specific definition of "educational institution."

The Federal Unemployment Tax Act, codified at 26 U.S.C. §3301-3311 recites only minimum guidelines for the various states to adhere to in order to receive administrative funding from the federal government. It therefore clearly contemplates diversity among the states in all nonspecifically regulated areas. The various states are free to adopt a definition of "educational institution" or to refrain from doing so. *Alexander vs. Employment Security Department of State*, 38 Wash.App. 609; 688 P2d 516, 523 (1984).

The language creating Head Start programs, specifically 42 U.S.C. 9831(a), fails to designate it as a specific educational institution, and indeed contains other objectives such as health, nutrition, social and other services. Not all programs are operated exactly the same. *In Re Huntley*, 42 N.C.App. 1, 255 S.E.2d 574, 575 (1975).

Given the very flexible and broad language contained in these federal statutes, it is inconceivable that either could be construed as dictating a specific course of action to be followed by the various states. Also persuasive is the fact that in each state case mentioned by Petitioner in its brief, the courts' decision was based on state law. *Alexander v. Employment Security Department of State, supra*; *In re Huntley, supra*; *Industrial Commission of State v. Board of County Commissioners of Adams*, 690 P.2d 839 (Colo. 1984); *Simpson v. Iowa Department. of Job Services*, 327 N.W.2D 775 (Iowa Ct.App. 1979).

PETITIONER HAS NOT DEMONSTRATED THAT THE QUESTION IS IMPORTANT.

In the eleven years since the challenged statute (Tex. Lab. Code Ann. art. 5221b-l[f]) became affective, January 1, 1978, this is the only case to reach the appellate courts. Surely other Head Start programs are affected; however, Petitioner has not shown what effect the challenged statute has or what other persons might be affected by a decision in this case.

CONCLUSION

For these reasons, and for the reasons stated in the opinion below, the Application For Writ of Certiorari should be denied.

Respectfully submitted,

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Attorney General of Texas

MARY F. KELLER
First Assistant Attorney
General

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August 5, 1988
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APPENDIX A

NO. 3-86-115-CV

IN THE THIRD COURT OF APPEALS AUSTIN, TEXAS

* *

TEXAS EMPLOYMENT COMMISSION,
Appellant
V.
CHILD, INC.,
Appellee

* *

APPELLEE'S MOTION FOR REHEARING

* *

The Opinion and Judgment of this Court issued September 23, 1987, should be reconsidered, and the matter reheard, on the following grounds:

MOTION FOR REHEARING - POINT NUMBER ONE

THE TRIAL COURT CORRECTLY DETERMINED THAT THE ADMINISTRATIVE DECISION WAS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE ADDUCED AT THE TRIAL AND THIS COURT HAS ERRED IN ITS UNDERSTANDING OF THE SUBSTANTIAL EVIDENCE--TRIAL DE NOVO RULE.

MOTION FOR REHEARING - POINT NUMBER TWO

THIS HONORABLE COURT HAS RULED INCORRECTLY, BECAUSE ONCE IT IS UNDERSTOOD THAT THE "SUBSTANTIAL EVIDENCE" WHICH IS REQUIRED TO SUPPORT THE AGENCY DECISION IS EVIDENCE THAT MUST BE ADDUCED IN THE TRIAL COURT, THE TRIAL COURT'S JUDGMENT MUST BE AFFIRMED BECAUSE APPELLANT REQUESTED NO FINDINGS OF FACT OR CONCLUSIONS OF LAW FROM THE TRIAL COURT AND THE EVIDENCE BEFORE THE TRIAL COURT SUPPORTS IMPLIED FINDINGS OF FACT FAVORING THE JUDGMENT.

MOTION FOR REHEARING - POINT NUMBER THREE

ALTHOUGH THIS HONORABLE COURT INCORRECTLY EQUATED CHILD, INC. WITH ITS PROJECT HEAD START COMPONENT (CHILD, INC. CONCLUSIVELY PROVED IT WAS AN EDUCATIONAL INSTITUTION WHICH, AMONG A GREAT MANY OTHER ACTIVITIES, RUNS A DESIGNATED PROJECT HEAD START AGENCY), THIS COURT SHOULD RULE AS A MATTER OF LAW THAT A DESIGNATED PROJECT HEAD START AGENCY IS AN "EDUCATIONAL INSTITUTION" FOR THE PURPOSE OF THE TEXAS UNEMPLOYMENT COMPENSATION ACT.

MOTION FOR REHEARING - POINT NUMBER FOUR

THE TRIAL COURT CORRECTLY REVERSED THE ARBITRARY AND CAPRICIOUS DECISION OF TEC; THIS COURT ERRED IN REVERSING THE JUDGMENT OF THE TRIAL COURT.

MOTION FOR REHEARING - POINT NUMBER ONE RESTATED

THE TRIAL COURT CORRECTLY DETERMINED THAT THE ADMINISTRATIVE DECISION WAS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE ADDUCED AT THE TRIAL AND THIS COURT HAS ERRED IN ITS UNDERSTANDING OF THE SUBSTANTIAL EVIDENCE--TRIAL DE NOVO RULE.

This Court, in reversing and rendering the judgment of the Trial Court, appears to have applied the "substantial evidence" rule incorrectly. Under *Mercer v. Ross*, 701 S.W.2d 830, at 831 (Tex. 1986) the Supreme Court offered the following instructive language.

> Appellate review of a TEC decision is provided for under Tex.Rev.Civ.Stat.Ann. Art 5221B--4(i) (Vernon 1971), which requires a trial de novo with substantial evidence review. TEC is specifically excluded from the Administrative Procedure and Texas Register Act, Tex.Rev. Civ.Stat.Ann.art. 6252-13a Subsection 21(g) (Vernon Supp.1985). A trial de novo review of a TEC ruling required the court to

> determine whether there is substantial evidence to support the ruling of the agency, *but the reviewing court must look to the evidence presented in trial and not the record created by that agency* (emphasis provided).

This Honorable Court's Opinion incorrectly relies upon the Findings of Fact by the Commission and the Commission's conclusions drawn from its findings. Under Mercer, the record created by the Agency is not to be looked at by either the Trial Court or by this Honorable Court. The Trial Court correctly reviewed the evidence that was presented to it. The trial evidence which Appellant cited as supporting TEC's decision that Child, Inc. was not an educational institution was not evidence inconsistent with the overwhelming evidence that Child, Inc. is an educational institution. In other words, for Child, Inc. to deliver early childhood development services under a Head Start program is not inconsistent with Child, Inc. being an educational institution. The administrative decision was not supported by substantial evidence adduced at the trial and in fact is supported by no evidence adduced at the trial.

MOTION FOR REHEARING - POINT NUMBER TWO RESTATED

> THIS HONORABLE COURT HAS RULED INCORRECTLY, BECAUSE ONCE IT IS UNDERSTOOD THAT THE "SUBSTANTIAL EVIDENCE" WHICH IS REQUIRED TO SUPPORT THE AGENCY DECISION IS EVIDENCE THAT MUST BE ADDUCED IN THE TRIAL COURT, THE TRIAL COURT'S JUDGMENT MUST BE AFFIRMED BECAUSE APPELLANT RE-

QUESTED NO FINDINGS OF FACT OR CONCLUSIONS OF LAW FROM THE TRIAL COURT AND THE EVIDENCE BEFORE THE TRIAL COURT SUPPORTS IMPLIED FINDINGS OF FACT FAVORING THE JUDGMENT.

Under *Lassiter v. Bliss*, 559 S.W.2d 353 (Tex. 1977) if there is evidence which supports implied Findings of Fact favoring the judgment on any legal theory the judgment will be upheld. Here, TEC requested no Findings of Fact or Conclusions of Law from the Trial Court, and all cases hold that every presumption will be indulged in favor of the Trial Court's judgment. The evidence before the Trial Court that Child, Inc. is an educational institution included the following:

> A. Child, Inc. was organized exclusively for public charity and *strictly educational* purpose (emphasis provided);
>
> B. Child, Inc. was granted an exemption from the Texas Sales Tax as *an educational organization* (emphasis provided);
>
> C. Child, Inc. delivers educational development for children, staff training for supervisors of small children, and the training and education of parents;
>
> B. Child, Inc. was granted an exemption from the Texas Sales Tax as an educational organization (emphasis provided);
>
> C. Child, Inc. delivers educational development for children, staff training for

supervisors of small children, and the training and education of parents;

D. Child, Inc. is currently engaged in two nationally funded project, the first in conjunction with the University of Arizona to develop an activity guide for curriculum for programs which serve young children and the second a national project to develop methods of training those who work with and provide educational services to young children;

E. Child, Inc. has provided cooperative laboratory schools on the campus of the University of Texas in the past and at the time of the trial operated a cooperative laboratory school with Austin Community College; and

F. Child, Inc. runs *the largest vocational training program* that has ever existed in Travis County (emphasis provided).

At page 2 of this Honorable Court's Opinion, this Court has stated that Child, Inc. does not provide jobs for any of its employees during the three months of each year falling between the nine month academic terms. There is no evidence in the record to support that conclusion. It is only in Child, Inc.'s Project Head Start component that jobs are not provided for employees during the three months falling between the nine month academic terms.

MOTION FOR REHEARING - POINT NUMBER THREE RESTATED

ALTHOUGH THIS HONORABLE COURT INCORRECTLY EQUATED CHILD, INC. WITH ITS PROJECT HEAD START

COMPONENT (CHILD, INC. CONCLUSIVELY PROVED IT WAS AN EDUCATIONAL INSTITUTION WHICH, AMONG A GREAT MANY OTHER ACTIVITIES, RUNS A DESIGNATED PROJECT HEAD START AGENCY), THIS COURT SHOULD RULE AS A MATTER OF LAW THAT A DESIGNATED PROJECT HEAD START AGENCY IS AN "EDUCATIONAL INSTITUTION" FOR THE PURPOSE OF THE TEXAS UNEMPLOYMENT COMPENSATION ACT.

The statutory framework of the Head Start programs is set out at 42 USC Section 9831 through 9851. At Section 9831(a) we read the statement of purpose and policy of Head Start programs.

> In recognition of the role which Project Head Start has played in the effective delivery of comprehensive health, educational, nutritional, social, and other services to economically disadvantaged children and their families it is the purpose of this subchapter to extend the authority for the appropriation of funds for such program.

Notice that Congress has recognized the educational services that Project Head Start has delivered to disadvantaged children and their families as a matter of law.

In Section 9836, the Secretary of Health and Human Services is authorized to designate as a Head Start Agency any local, public or private non-profit agency which has the power and authority to carry out the purposes of the Subchapter and is determined to be

capable of planning, conducting, administrating, and evaluating a Head Start program. At Section 9833, the Secretary of Health and Human Services is authorized to grant to a designated agency funds to promote

> a Head Start program focused primarily upon children from low income families who *have not reached the age of compulsory school attendance which (1) will provide such comprehensive* health, nutritional, *educational*, social and other *services* as will aid the children to attain their full potential; and (2) will provide for direct participation of the parents of such children in the development, conduct, and overall program direction on the local level (emphasis provided).

As a matter of law, the United States Congress has funded Head Start to provide educational services for pre-school children who have not reached the age of compulsory school attendance. This Court makes mockery of the Federal Statute when it relies on the age of the children as any evidence at all that they are not capable of being educated; or that no institution serving their needs is "educational." The better reasoning is found in *Simpson v. Iowa Department of Job Service*, 327 N.W.2d 775, where the Court said the following:

> The record reflects that there are four components to the Head Start program at issue here: a health component; parental involvement component; social services component; and education component. The educational component involves the teaching the language, speaking, and self expression. The Head Start participants

> are oriented toward preparation toward the public school system. Additionally, the parents of Head Start children are educated in nutrition and child care. Admittedly, there are elements of the Head Start Program which could not be considered academic , but which we believe are sufficient indicia of academic training to warrant a finding consistent with (the Iowa Employment Security Law).

The Iowa Court cited a North Carolina case in support of its position and concluded by saying:

> We agree with the District Court's conclusion that Head Start is an educational institution within the meaning of Section 96.19(37) and that as such petitioners are barred from unemployment compensation since they had reasonable assurance of re-employment in the next successive academic term in a similar capacity.

MOTION FOR REHEARING - POINT NUMBER FOUR RESTATED

> THE TRIAL COURT CORRECTLY REVERSED THE ARBITRARY AND CAPRICIOUS DECISION OF TEC; THIS COURT ERRED IN REVERSING THE JUDGMENT OF THE TRIAL COURT.

With all due respect, this Honorable Court appears to have ignored the substantial evidence rule in trial de novo cases, it appears to have ignored the evidence adduced before the Trial Court and the failure of TEC to request Findings of Fact and Conclusions of

Law; it seems to have equated Child, Inc. with its Head Start Program; and it has definitely determined that Project Head Start agencies cannot be educational institutions based on the delivery of Project Head Start services. The last determination seems to fly in the face of federal statute and appellate decisions from Iowa and North Carolina. This Honorable Court should withdraw its Opinion and affirm the Judgment of the Trial Court.

Respectfully submitted,

MARK Z. LEVBARG
A PROFESSIONAL CORPORATION

BY:____________________
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ATTORNEY FOR APPELLEE

CERTIFICATE OF SERVICE

By my signature above, I do hereby certify to the Court that a true and correct copy of the foregoing document has been forwarded by ___ hand delivery; ___ certified mail, return receipt requested, to Ms. Susan F. Eley, P.O. Box 12548, Austin, Texas 78711-2548 this the 8th day of October, 1987.

NO. ________________

IN THE SUPREME COURT OF TEXAS
AT AUSTIN

CHILD, INC.,
Petitioner

V.

TEXAS EMPLOYMENT COMMISSION,
Respondent

PETITIONER'S APPLICATION FOR WRIT OF ERROR

TO THE SUPREME COURT OF TEXAS:

Child, Inc. presents this Application for Writ of Error and respectfully shows this Court the following matters.

CERTIFICATE OF PARTIES

Pursuant to Tex. R. App. Proc. 131(a) Petitioner respectfully calls the Court's attention to the parties involved in this appeal and their respective interest so that the members of the Court may at once determine whether they are disqualified to serve or should excuse themselves from participation in the decision of this case.

A. Child, Inc., which was the Plaintiff in the Trial Court and the Appellee in the Austin Court of Appeals, a Travis County, Texas, non-profit corporation

exempt from Texas sales tax as an educational organization, is the Petitioner.

B. The Texas Employment Commission was Defendant in trial and Appellant in the Court of Appeals, and is the Respondent here.

PRELIMINARY STATEMENT

Among other activities, Child, Inc. operates a Project Head Start program pursuant to 42 U.S.C. Sections 9831 through 9851. Project Head Start is funded for nine month academic terms but not for the three summer months. Child, Inc.'s Head Start employees do not work during the three summer months between terms. Are they entitled to unemployment compensation? TEC ruled that they are. The Trial Court ruled that Child, Inc. is an educational institution for the purpose of the Texas Unemployment Compensation Act and reversed the TEC ruling. The Austin Court of Appeals reversed the Trial Court, relying heavily on the record before the Commission. Child, Inc. has applied for this Writ of Error and seeks to reverse the Judgment of the Austin Court of Appeals and reinstate the Trial Court's Judgment.

STATEMENT OF JURISDICTION

The Supreme Court has jurisdiction of this Appeal under the provisions of V.T.C.A. Government Code Sections 22.001(a)(2) and (a)(6).

POINTS OF ERROR

POINT OF ERROR NUMBER ONE

THE AUSTIN COURT OF APPEALS RULED INCORRECTLY, BECAUSE

ONCE IT IS UNDERSTOOD THAT THE "SUBSTANTIAL EVIDENCE" WHICH IS REQUIRED TO SUPPORT THE AGENCY DECISION IS EVIDENCE ADDUCED IN THE TRIAL COURT, THE TRIAL COURT'S JUDGMENT MUST BE AFFIRMED SINCE RESPONDENT REQUESTED NO FINDINGS OF FACT OR CONCLUSIONS OF LAW FROM THE TRIAL COURT AND THE EVIDENCE BEFORE THE TRIAL COURT SUPPORTS IMPLIED FINDINGS OF FACT FAVORING THE JUDGMENT.

POINT OF ERROR NUMBER TWO

THE TRIAL COURT CORRECTLY DETERMINED THAT THE ADMINISTRATIVE DECISION WAS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE ADDUCED AT THE TRIAL AND THE AUSTIN COURT OF APPEALS ERRED IN REVERSING THAT JUDGMENT BASED ON ITS MISUNDERSTANDING OF THE SUBSTANTIAL EVIDENCE--TRIAL DE NOVO RULE.

POINT OF ERROR NUMBER THREE

THE TRIAL COURT CORRECTLY REVERSED THE ARBITRARY AND CAPRICIOUS DECISION OF TEC; THE AUSTIN COURT OF APPEALS ERRED IN REVERSING THE JUDGMENT OF THE TRIAL COURT BY USING THE SAME ARBITRARY AND CAPRICIOUS ILLOGIC AS THE COMMISSION.

POINT OF ERROR NUMBER FOUR

THE TEXAS SUPREME COURT SHOULD RULE AS A MATTER OF LAW THAT A DESIGNATED PROJECT HEAD START AGENCY IS AN "EDUCATIONAL INSTITUTION" FOR THE PURPOSE OF THE TEXAS UNEMPLOYMENT COMPENSATION ACT.

STATEMENT OF FACTS IN SUPPORT OF ALL POINTS

This highly unusual case presents both a substantive issue of first impression and a procedural issue of first impression in Texas. Among other activities, Child, Inc. operates all of the Project Head Start early childhood development centers in Travis County, Texas. Project Head Start is funded for nine months each year by the Federal Government, coincident with the school year. Are Head Start employees entitled to collect unemployment benefits for the summer months between academic terms In the past, TEC determined that Head Start employees who were employed by Head Start Programs operated by public schools could not collect unemployment benefits for the summer months. TEC also determined that Head Start programs operated by "Community Action Agencies" were not educational institutions and would have to be taxed to pay unemployment benefits for the employees not working during the summer. Child, Inc. is neither a public school nor a Community Action Agency. It is a non-profit corporation organized for educational purposes and exempt from Federal and State taxes as an educational organization. TEC determined that Child, Inc. was not an educational institution and its Head Start employees could collect unemployment benefits during the summer vacation.

The Trial Court reversed TEC, judging that Child, Inc. was an "educational institution" as that term is understood in the Texas Unemployment Compensation Act. The Austin Court of Appeals, citing the "substantial evidence" rule, *proceeded to detail the findings of fact by the Commission and its conclusions based on its findings* (pages 5 and 6 of the Opinion) rather than deal with the evidence adduced at trial, and reversed the Trial Court. While the Austin Court of Appeals erroneous application of the "substantial evidence" rule rather than the substantial evidence with trial de novo review rule requires reversal, there are two questions of first impression that are raised. First, in the procedural context, the substantial evidence with trial de novo review rule is in effect for TEC appeals. The reviewing Court must look to the evidence presented *in trial* and not to the record created by the Agency. Here the Agency has failed to request Findings of Fact or Conclusions of Law from the Trial Court, and the Agency should be preduded from complaining about the Judgment of the Trial Court, under *Lassiter v. Bliss*, 559 S.W.2d 353 (Tex. 1977), if there is any evidence which supports implied Findings of Fact favoring the Judgment on any legal theory. In other words, it would seem that the substantial evidence rule, in the trial de novo context, becomes irrelevant in the face of a violation of the mandate of Texas Rules of Civil Procedure 296-299. This interplay of issues has not, apparently, been spoken to by a Texas court.

The substantive issue concerns the nature of Project Head Start. Three other states have dealt with the issue of whether a Project Head Start program in and of itself is "educational" under the pattern unemployment compensation statutes. Iowa and North Carolina have determined that Project Head Starts are per se "educational institutions." Colorado has taken a

different course and determined that Project Head Start must be delivered by a public school to be considered an "educational institution." TEC would adopt the Colorado approach. No Texas court has faced this question and Texas will be the fourth state, and the largest state, to have dealt with it.

The Colorado approach is costly to the children in the programs, because the funding of Project Head Start by the Federal Government will not allow for an increase to "cover" the unemployment tax during the mandatory unfunded period of the program, summer vacation. As a result, fewer children can be

POINT OF ERROR NUMBER ONE RESTATED

> THE AUSTIN COURT OF APPEALS RULED INCORRECTLY, BECAUSE ONCE IT IS UNDERSTOOD THAT THE "SUBSTANTIAL EVIDENCE" WHICH IS REQUIRED TO SUPPORT THE AGENCY DECISION IS EVIDENCE ADDUCED IN THE TRIAL COURT, THE TRIAL COURT'S JUDGMENT MUST BE AFFIRMED SINCE RESPONDENT REQUESTED NO FINDINGS OF FACT OR CONCLUSIONS OF LAW FROM THE TRIAL COURT AND THE EVIDENCE BEFORE THE TRIAL COURT SUPPORTS IMPLIED FINDINGS OF FACT FAVORING THE JUDGMENT.

According to *Mercer v. Ross*, 701 S.W.2d 830, at 831 (Tex. 1986), Appellate review of a TEC decision is by trial de novo. The Trial Court is required to determine whether there is substantial evidence to support the ruling of the Agency, but the reviewing Court must look to the evidence presented in trial and

not the record created by that Agency. The record to be dealt with is not the Agency record but the trial record. Where TEC requested no Findings of Fact or Conclusions of Law from the Trial Court, the Trial Court's Judgment must be affirmed if the evidence before the Trial Court supports implied Findings of Fact favoring the Judgment. See *Renfro Drug Co. v. Lewis*, 235 S.W.2d 609 at 613 (Tex. 1951), and *Lassiter v. Bliss,* 559 S.W.2d 353 (Tex. 1977).

The evidence clearly supported the Trial Court's Judgment. The controlling fact issue in this case is whether or not Child, Inc. is an "educational institution." Child, Inc. was organized exclusively for public charity and strictly educational purposes (SF 30, 1. 25 to SF 31, 1. 2, PX 1, TRX Vol. No. Pl). Child, Inc. was granted an exemption from the Texas sales tax as an educational institution (SF 33, 11. 12-13, PX 2, TRX Vol. No. P3). Testimony concerning Child, Inc.'s educational services was received throughout the trial. Child, Inc. is engaged in three basic functions in the areas of education and training; these are educational development for children, staff training for supervisors of small children, and the training and education of parents. Child, Inc. is currently engaged in two nationally funded projects, the first in conjunction with the University of Arizona to develop an activity guide for curriculum for programs that serve young children, and the second, a national project to develop methods of training those who work with and provide educational services to young children (SF 33, 1. 16 to SF 34, 1. 5). Child, Inc. has provided cooperative laboratory schools on the campus of the University of Texas in the past and at the time of the trial operated a cooperative laboratory school with Austin Community College (SF34, 11. 8-20). Child, Inc. runs the largest vocational training program that has ever existed in Travis County. SF 84, 11. 21-24. One of the

Defendants, Shirley Brown, who testified in this case, had no quarrel with Mr. Strickland and agreed that vocational education is a big responsibility of Child, Inc. SF 12, 11. 16-19. It is clear the judgment below was supported by the evidence.

POINT OF ERROR NUMBER TWO RESTATED

> THE TRIAL COURT CORRECTLY DETERMINED THAT THE ADMINISTRATIVE DECISION WAS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE ADDUCED AT THE TRIAL AND THE AUSTIN COURT OF APPEALS ERRED IN REVERSING THAT JUDGMENT BASED ON ITS MISUNDERSTANDING OF THE SUBSTANTIAL EVIDENCE--TRIAL DE NOVO RULE.

No substantial evidence was presented that Child, Inc. is not an educational institution. Child, Inc.'s Head Start Program is an early childhood development program and its curriculum cannot be dismissed as mere "daycare." Its curriculum is appropriate for pre-school children (see Plaintiff's Exhibit Number 4, TR Exhibit Volume P4). However, it was inappropriate for TEC to blind itself to the other activities of Child, Inc., just as it was improper for the Austin Court of Appeals to do. The Austin Court of Appeals wrote an Opinion which effectively stated that all of Child, Inc.'s (approximately two hundred) employees were Head Start employees, when in fact, Project Head Start is only part of Child, Inc.'s activities and there were only fifteen applicants in this case. The Austin Court of Appeals adopted the Commission's findings and conclusions in its Opinion, which is wholly inappropriate under Mercer v. Ross.

POINT OF ERROR NUMBER THREE RESTATED

THE TRIAL COURT CORRECTLY REVERSED THE ARBITRARY AND CAPRICIOUS DECISION OF TEC; THE AUSTIN COURT OF APPEALS ERRED IN REVERSING THE JUDGMENT OF THE TRIAL COURT BY USING THE SAME ARBITRARY AND CAPRICIOUS ILLOGIC AS THE COMMISSION.

The Austin Court of Appeals' decision is arbitrary and capricious because of its illogic. The record below, as detailed in the argument under Point of Error Number One, sets forth many activities which are unique to an educational institution. It also sets forth activities that are cited by the Court of Appeals at pages 5 and 6 of its Opinion. Within the Project Head Start Program, pre-schools are operated, the teachers are not licensed school teachers, the children are pre-school age, and the focus of the program is to provide low income children with basic learning skills and socialization necessary to function as well in the regular school system as children of higher income families. While these services might be available outside of an educational institution, *they are not inconsistent with the cooperation of an educational institution and are therefore no evidence whatsoever that Child. Inc. is not an educational institution*. The Court of Appeals' Opinion and the Commission's ruling were arbitrary and capricious and the Judgment of the Trial Court was correct.

POINT OF ERROR NUMBER FOUR RESTATED

THE TEXAS SUPREME COURT SHOULD RULE AS A MATTER OF LAW THAT A

DESIGNATED PROJECT HEAD START AGENCY IS AN "EDUCATIONAL INSTITUTION" FOR THE PURPOSE OF THE TEXAS UNEMPLOYMENT COMPENSATION ACT.

The statutory framework of the Head Start programs is set out at 42 U.S.C. Sections 9831 through 9851. In Section 9831(a) the purpose and policy of Head Start programs is stated.

> In recognition of the role which Project Head Start has played in the effective delivery of comprehensive health, educational, nutritional, social and other services to economically disadvantaged children and their families it is the purpose of this subchapter to extend the authority for the appropriation of funds for such program.

Notice that Congress has recognized the *educational* services that Project Head Start has delivered to disadvantaged children *and their families* as a matter of law.

In Section 9836, the Secretary of Health and Human Services is authorized to designate, as a Head Start Agency, any local, public or private non-profit agency which has the power and authority to carry out the purposes of the subchapter and is determined to be capable of planning, conducting, administrating, and evaluating a Head Start Program. In Section 9833, the Secretary of Health and Human Services is authorized to grant to a designated agency funds to promote

> a Head Start program focused primarily upon children from low income families who have not reached the age of compulsory

> school attendance which (1) will provide such comprehensive, health, nutritional, educational, social and other services as will aid the children to attain their full potential; and (2) will provide for direct participation of the parents of such children in the development, conduct, and overall program direction on the local level (emphasis provided).

As a matter of law the United States Congress has funded Head Start to provide educational services for pre-school children who have not reached the age of compulsory school attendance. This Austin Court of Appeals Opinion has made mockery of the Federal Statute when it relies on the age of the children as evidence that they are not capable of being educated; or as evidence that no institution serving their needs is "educational." The better reasoning is found in *Simpson v. Iowa Department of Job Service*, 327 N.W.2d 775, where the Court said the following:

> The record reflects that there are four components to here: a health the Head Start program at issue component; social component; parental involvement educational component. The services component; and involves the teaching the component The Head educational speaking, and self expression, preparation language, Start participants are oriented toward toward the public school system. Additionally, the parents of Head Start children are educated in nutrition and child care. Admittedly, there are elements of the Head Start Program which could not be considered academic, but which we believe are sufficient indicia of academic training to

> warrant a finding consistent with (the Iowa Employment Security Law).

The Iowa Court cited a North Carolina case in support of its position and concluded by saying:

> We agree with the District Court's conclusion that Head Start is an educational institution within the meaning of Section 96.19(37) and that such petitioners are barred from unemployment compensation since they had reasonable assurance of re-employment in the next successive academic term in a similar capacity.

CONCLUSION

The Austin Court of Appeals has blatantly disregarded and findings incorrectly cited *Mercer v. Ross* in adopting Commission and rulings. It ignored the evidence adduced before the Trial Court and it ignored the failure of TEC to follow Texas Rules of Inc. with Civil Procedure 296 through 299. It equated Child, capriciously ignored its Head Start Program and arbitrarily and capriciously ignored Child, Inc.'s institutional base to focus on one aspect of its services. That aspect is not inconsistent with the operation of an educational institution. The Austin Court of Appeals has effectively determined that Project Head Start agencies cannot be educational institutions simply based on the delivery of Project Head Start services, and that determination seems to fly in the face of Federal Statute and appellate decisions from Iowa the and North Carolina. Petitioner respectfully requests that Supreme Court of Texas grant Writ of Error in this case on all points, in the interest of justice and equity, and so that low income families and their children in Texas will not be ill served.

Respectfully submitted,

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A PROFESSIONAL CORPORATION

BY:____________________________
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ATTORNEY FOR PETITIONER

CERTIFICATE OF SERVICE

By my signature above, I do hereby certify to the Court that a true and correct copy of the foregoing document has been forwarded by ___ hand delivery; ___ certified mail, return receipt requested, to Ms. Susan F. Eley, P.O. Box 12548, Austin, Texas 78711-2548 this the 20th day of November, 1987.